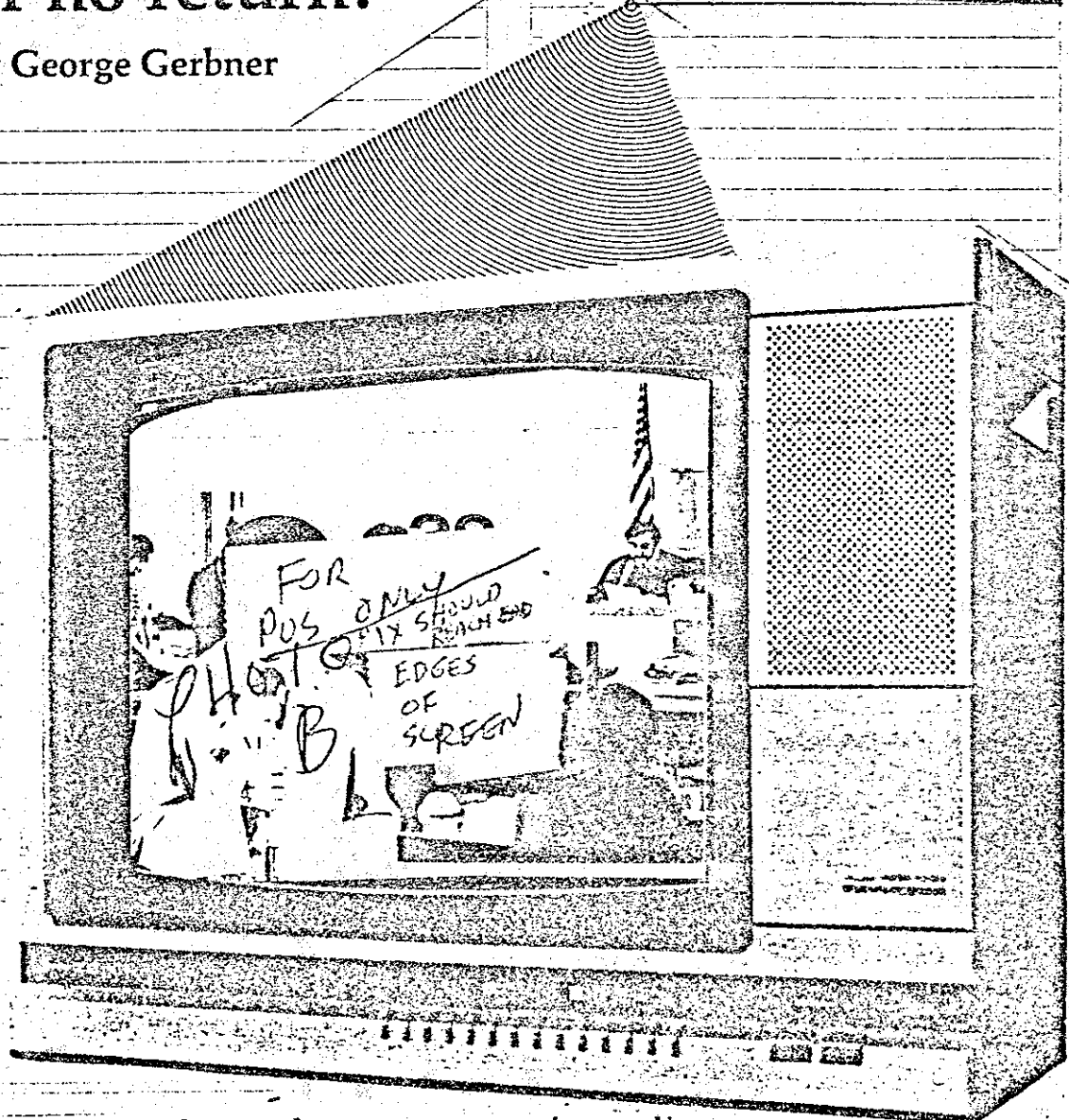
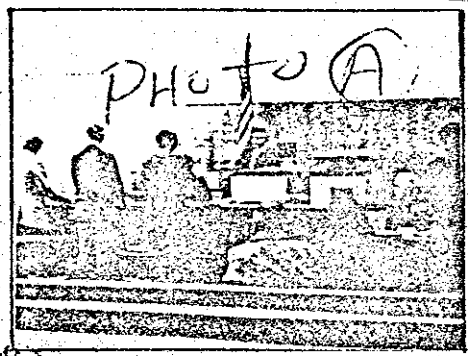


# Trial by television: Are we at the point of no return?

by George Gerbner



*Television reshapes the way we perceive reality. Before we allow TV in even one courtroom we must know more about its effects on trials and on our image of justice.*

COURTROOM PHOTOS: THE MILWAUKEE JOURNAL

**T**elevision is moving into the American courtroom. The sudden rush seems to fly in the face of the known risks of prejudice, the certainty of endless litigation, a decision of the Supreme Court, resistance on the federal level, and a vote last year by the American Bar Association to uphold its advisory ban on cameras in the courtroom.

Some speakers called the ABA stand "a rear guard action long after the dawn of the electronic age."<sup>1</sup> Since television made its claims on behalf of the public's right to know, resistant delegates appeared to be in a last-ditch defense against the inevitable march of freedom. In the most widely reported comment, former FCC Commissioner and Washington attorney Lee Loevinger told the ABA delegates: "You're fooling yourselves. I don't think we have any choice. We'll continue to get television coverage whether we like it or not."<sup>2</sup>

Events may prove Loevinger right. Television has already entered courtrooms in the majority of states or is about to do so for "experiments" whose long-range effects no one is prepared to evaluate seriously. No meaningful research has yet demonstrated the validity of arguments for television trials or the benefits from trials already televised. No one has yet investigated the potentially far-reaching social impact and institutional consequences of plugging the administration of criminal justice into a system geared to entertainment and sales.

Our organs of public discussion, the mass media, are hardly disinterested parties in the debate. They are not motivated, to say the least, to expose their own blindspots and limitations. As a result, the public debate has been conducted on narrow, obsolete, and at times misleading grounds.

• Freedom to report is not the issue. Journalists—both broadcast and print—are free to cover most trials. The fact that they choose to report only a few of the most dramatic ones

already warps public understanding of the judicial process. Television trials would not help that. They would only add audiovisual spectacle and further dramatic diversion to the reporting.

• Ostrusive equipment and courtroom decorum are no longer issues. Video technology can be unobtrusive and can even reduce the movement of reporters during the trial by providing monitors for them outside the courtroom.

• Even video recording is not the issue. Canon 3A(7) of the Code of Judicial Conduct already permits recording of trials for educational purposes, so long as the tapes are shown after the trial and all appeals have been exhausted.

The only remaining issue is whether the addition of video spectacle to the already existing press and broadcast coverage would reduce or increase the risk of prejudice and whether it would correct or further extend the viewers' already distorted image of the court. That issue has been addressed—and then ignored. The Supreme Court has said that the sudden notoriety of judges, jurors, attorneys, and defendants and "heightened public clamor" would "inevitably result in prejudice."<sup>3</sup> And prejudice could extend far beyond the courtroom since television profoundly affects the social and political climate and the institutional setting in which courts work.

### **Altering the historic relationship**

Trials by television are likely to alter the historic relationship between two institutions that have largely divergent and partially conflicting functions. Popular entertainment and news via mass media represent the conventional cultural pressures of the social order. The judicial process, however, represents an effort to adjudicate individual cases according to law. That distinction is crucial to this whole discussion.

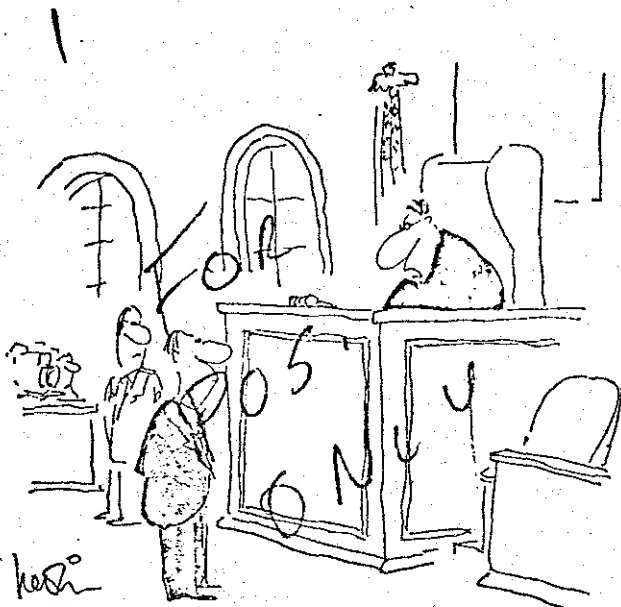
In criminal cases, the most likely to be televised, a fair trial means determination of guilt of the specific offense charged, and not, as in general entertainment and news, whether a person has done something bad for which he or she should be punished. In fact, a trial must proceed as independently as possible from conventional moral pressures and the popular clamor of the moment. Televising trials may

3. *Estes v. Texas*, 381 U.S. 532, 538-49 (1965).

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1. *Bar Association Votes to Continue Its Ban on TV and Radio in Courts*, N. Y. TIMES, February 13, 1979, p. A16.

2. *Id.*



"For heaven's sake, man, look ashamed.  
We're being televised."

Drawing by Levin, © 1979 The New Yorker Magazine, Inc.

erode independence of judges to do justice in each case; it would do nothing to ensure greater fairness that existing media scrutiny could not do.

The erosion of independence will be hard to track and difficult to measure. It will occur as television trials, despite any safeguards within the court,<sup>4</sup> are selected and edited to fit the existing patterns of television. We may be on the verge of drifting into a major institutional transformation while assuming that we are only making a few public-spirited adjustments.

A review of research on the impact of television on American institutions shows that it has reshaped politics, changed the nature of sports and business, transformed family life and the socialization of children, and affected public security and the enforcement of laws.<sup>5</sup> The debate over cameras in the courts may be our last opportunity to consider the evidence already available on the influence of television on public images of law and the courts, and to halt the rush toward televised trials until we can take a fresh look at the problem.

4. Even safeguards require vigorous enforcement, which is impractical. An analysis of the effectiveness of ABA and state press-bar guidelines covering the release of pre-trial information, and reported in bar and press polls to work "reasonably well," found that 67.7 per cent of the stories violated the agreement. Tankard, Middleton and Rimmer, *Compliance with American Bar Association Fair Trial-Free Press Guidelines*, 56 JOURNALISM Q. 461, 468 (Autumn 1979).

5. Comstock, *The Impact of Television on American Institutions*, 28 J. OF COM. 12 (Spring 1978).

## Television as a system

Television is our common and constant learning environment. Our children are born into it. In the typical home, the family watches more than six hours of TV a day in a ritual most people perform with little selectivity or deviation.

Television demands no mobility, literacy, or concentrated attention. Its repetitive patterns come into the home and show as well as tell about people and society. Presidents, policemen, judges, spies and celebrities are familiar parts of a selective, synthetic, symbolic environment of entertainment and news in which we grow up and learn most of what we know in common.

Different kinds of programs serve the same basic formula: they assemble viewers and sell them at the least cost. The classifications of the print era—the relatively sharp differentiation between news, drama, documentary, etc.—do not apply to television. Heavy viewers watch more of everything. Different programs complement and reinforce each other as they entertain the same audiences and repeat the same propositions about life and society. Most program formulas present different aspects of the same symbolic world made to the same specifications of television and its sponsors.

The process of socialization via entertainment is an exercise in social typing. It sets the norms of society by showing their frequent violations. Offenders and their victims cast for most dramatic attention (or selected as "news-worthy") tend to be those who fit established preconceptions.<sup>6</sup>

## Lessons in justice and power

Most action on television revolves around some demonstration of justice and power. Violence, the stock dramatic device of that demonstration, gives us the cheapest and quickest lesson on who should get away with what against whom. Two-thirds of all major dramatic characters are involved in some violence. When women and minorities are involved,

6. See, e.g., Jones, *The Press as Metropolitan Monitor*, 40 PUB. OPINION Q. 239 (Summer 1976); Smith, *Mythic Elements in Television News*, 29 J. OF COM. 75 (Winter 1979); Graber, *Is Crime News Coverage Excessive?* 29 J. OF COM. 81 (Summer 1979); Mishra, *How Commercial Television Networks Cover News of Law Enforcement*, 56 JOURNALISM Q. 611 (Autumn 1979).

they are more likely to be victims than victimizers, and they are generally underrepresented and devalued in many other ways.<sup>7</sup> Casting and fate on television combine to present—and to cultivate—a social structure typically ruled by force and dominated by stereotypes.

According to a study of television drama and the law by Albert S. Tedesco, crime on television is not only much more rampant than in real life but also very different.<sup>8</sup> Television characters are the targets of crime about 10 times as often as people in the real world. Nearly 41 per cent of all television crimes are murders; the next leading crime amounts to only 5 per cent of all TV crimes. A disproportionate number of victims are whites. (In the real world, property crimes are most common and a disproportionate number of victims are blacks.)

Half of all television police make arrests each week, and nine out of 10 times they solve crime by making successful arrests. In real life the clearance rate is about 11 per cent. Arrest sends the suspect into a legal limbo. Tedesco, confirming other investigators, found that the police observe suspect's rights in fewer than two in every 10 cases.

### Law in the world of television

Typical viewers of prime time and weekend daytime network shows alone receive the lessons inherent in vivid images of an average of 30 police officers, seven lawyers, and three judges every week.<sup>9</sup> But what do they learn?

A study of 15 prime time police programs telecast in one week found that in all but three the enforcers of the law routinely committed clear violations of constitutional rights.<sup>10</sup> The authors, an attorney and a law professor, conclude:

7. Gerbner and Signorielli, *WOMEN AND MINORITIES IN TELEVISION DRAMA 1969-1978*. Philadelphia: The Annenberg School of Communications, University of Pennsylvania, 1969.

8. Tedesco, "Images of the State in Characterizations of Police and Legal Professionals," doctoral dissertation in progress, The Annenberg School of Communications, University of Pennsylvania, Philadelphia.

9. These figures come from our data bank based on the annual monitoring of network television drama since 1967. For a general description, see Gerbner, Gross, Jackson-Beeck, Jeffries-Fox, and Signorielli, *Cultural Indicators: Violence Profile No. 9*, 28 J. OF COM. 176 (Summer 1978).

10. Arons and Katsh, *How TV Cops Flout the Law*, SATURDAY REVIEW, March 19, 1977.

The overall image that shows project is clearly one that is alien to the Constitution. Hardly a single viewing hour passes without an illegal search, or a confession obtained by coercion, or the failure to provide counsel. Warrants are not sought or issued, and hardly any mention is made of notifying suspects of their right against self-incrimination.

Scores of citizens uninvolved in the crime under investigation are roughed up, shaken down, or harassed—by police. Homes, offices, and cars are broken into regularly—by police.... Every such invasion of personal privacy turns up the real, and usually demented, criminal, or is justified because the victim was probably guilty of some crime anyway. Honest, law-abiding citizens are miraculously never hurt by these methods.<sup>11</sup>

The authors wonder if the daily obliteration of rights on TV may not be responsible for their casual violations in real life and for the growing pressure on the courts to conform to the tough omniscience and omnipotence of television justice.<sup>12</sup>

On television, police are the law, virtually isolated from lawyers and the criminal justice system. In 157 crime programs studied by Tedesco a lawyer only once interceded in a police action against a citizen.<sup>13</sup>

Television lawyers are equally removed from real life. Consider these findings by Tedesco:

- Two-thirds work on criminal cases, mostly murder, performing selfless service defending needy clients.

- Nine in 10 television lawyers are wealthier than their clients. Few work for the corporations that in real life employ most lawyers.

- Six out of 10 lawyers defend clients wrong-

11. *Id.*, at 14.

12. Broadcasting codes requiring that crime must not go unpunished provide a standard of justice seen every day on television that no real system of law enforcement can meet. (For the text of those codes, see Cassata and Asante, *MASS COMMUNICATIONS: PRINCIPLES AND PRACTICES*, Appendix A, "The Codes." New York: Macmillan, 1979.)

This idealized standard sets up courts as a disappointing experience. See *THE PUBLIC IMAGE OF THE COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS, AND COMMUNITY LEADERS* 17. Williamsburg, Va.: The National Center for State Courts, 1978.

Televized trials selected to contrast legal complexities with the swift justice of Perry Mason would exploit that dissatisfaction. The suggestion that such exposure might hasten necessary reform does not jibe with past performance. A comprehensive review concludes that "With few honorable exceptions, journalists and broadcasters defaulted on their obligation to educate the public on the issues of penal reform." Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L. J. 224 (1977).

13. Tedesco, *supra* n. 8.

fully accused and eventually acquitted.

- One-third of all television lawyers serve as prosecutors.

- TV lawyers rarely defend professional criminals (who always lose); when they do, the lawyers are likely to be corrupt or criminal themselves.

The scenario of social typing and the confirmation of conventional presumptions—rather than the judicial avoidance of all that—is the substance of the law on television.

### The mind of the beholder

Television is also a primary source of our information about occupations. On a test of occupational knowledge children score significantly higher in their knowledge of rare vocations they see frequently on television than their knowledge of more common occupations they seldom see on TV.<sup>14</sup> Children who give television as the source also have more to say about the professions. When we consider all sources of information other than television (but including conversation), we learn that less than half the children named other sources for information about lawyers and less than one third named other sources for information about judges.<sup>15</sup>

The majority could not cite any difference between lawyers on television and in real life; 73 per cent could not cite any differences between judges on television and in real life. As the researcher noted, "...viewing of television was found to cultivate an understanding of the world of law enforcement consistent with television's somewhat inaccurate portrayals."<sup>16</sup>

Is there any way to calculate the effects upon adults? Research conducted so far can show the background of television-cultivated conceptions of social reality into which televised trials will have to fit. The research found that exposure to television cultivates a heightened sense of living in a mean and violent world. Again,

14. DeFleur and DeFleur, *The Relative Contribution of Television as a Learning Source for Children's Occupational Knowledge*, 32 AM. SOC. REV. 777 (October 1964).

15. Jeffries-Fox, "Television's Contribution to Young People's Conceptions about Occupations," unpublished doctoral dissertation, The Annenberg School of Communications, University of Pennsylvania, Philadelphia (1978).

16. *Id.*, at 208-9

consider these findings.<sup>17</sup>

- Heavy viewers (compared to light viewers in the same age, sex, and socio-economic groups) exhibit a consistently higher degree of insecurity, mistrust, and quest for protection.

- They give higher estimates than light viewers of their chances of encountering violence, the proportion of violent crimes, the number of people involved in law enforcement, the danger of walking a city street at night, and the number of times policemen use their guns.

- They are more likely than light viewers to agree that people just look out for themselves, try to take advantage of others, and cannot be trusted.

- And they are more likely than their light viewing neighbors to seek protection and take protective measures themselves. All in all, television viewing appears to cultivate relatively anxious hard-line attitudes among viewers of most types, particularly the young.

### Are trials made-for-TV?

But if television begins broadcasting trials, won't it give a more accurate portrayal than fiction? Probably not. Selected courtrooms will become program originating locations, transporting the sights and sounds of real courtrooms into millions of homes conditioned to a weekly ritual of courtroom and crime drama. Trials will be picked and edited to fit that dramatic ritual.

The problem is that the opaque reality of the courtroom is less illuminating of the judicial process than is translucent fiction. One must go behind the scenes to see how things really work. Surface appearances are more likely to conceal than to reveal how the judicial system operates. Television will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television.

Indeed, the media have already recognized that the public, so woefully misinformed about the courts, is not very interested in the issues that really occupy the judicial system. The exceptions are a few highly visible and politically charged controversies such as desegregation,

17. For the most recent reports, and references to previous studies, see Gerbner, Gross, Signorielli, Morgan, and Jackson-Beeck, *The Demonstration of Power: Violence Profile No. 10*, 29 J. OF COM. 177 (Summer 1979).

The purpose of open trials is to help protect the accused, not to entertain or even to educate.

prayer in the public schools, capital punishment, abortion, and "coddling" defendants in criminal cases.<sup>18</sup> Public interest too often results from publicity the media give to claims of judicial excess and leniency, and from organized groups objecting to the enforcement of laws they dislike in the first place.

Television thus represents a process that sets cultural norms and generates anxieties and insecurities that can find release in dependence on strong authority and in harsh or repressive measures. These social functions of media compete and conflict with those of the courts. The history of troubled relations between the two institutions shows a precarious balance reached at great cost over the centuries.

### Institutions at cross-purposes

Entertainment is the cultivation of conventional morality. It "entertains" the basic values and norms of the community and cultivates conformity to those norms. An important part of that process is the exploitation of popular prejudices and the cultivation of public support for the suppression of threats and challenges to the social order.

From the arenas of the Roman empire to this very day, show trials, highly publicized confessions, public tribunals and executions have helped to reaffirm the legitimacy of contemporary values. The most widely frequented

18. Schwartz, *supra* n. 12.

shows in London just emerging from the Middle Ages were public executions, and

even after these were abolished, attendance at murder trials remained as a more socially restricted but nevertheless much sought-after entertainment. A visit to a hanging might well, one presumes, have followed a gentle prodding with a stick of some madman at Bedlam.<sup>19</sup>

The great show trials and public confessions of the twentieth century occurred under dictatorships and during periods of witchhunt in democracies. They were a part of the entertainment mainstream, now joined by much of what we call news, compelling attention, exposing deviation, spreading fear, and cultivating conformity.<sup>20</sup>

The struggle to remove trials from the public arena paralleled the fight against secret proceedings, the Star Chamber. In fact, the two are sides of the same coin. Arbitrary power wants no public witness to its private deliberations but needs all the hoopla it can get to legitimize its actions.

The integrity and independence of judicial proceedings serve to protect the accused from both arbitrary power and public prejudice. The purpose of open trials is to help assure observance of these protections, not to entertain or even to educate.

### Why Canon 35 was adopted

General entertainment and specific rights have never mixed well. Chief Justice Earl Warren pointed out in *Estes v. Texas* that "In the early days of our country's development, the entertainment a trial might provide often tended to obfuscate its proper role."<sup>21</sup> And he continued, citing other accounts:

The people thought holding court one of the greatest performances...the country folk would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with them whether he won or lost his case, so long as the 'pleading' was loud and long.

In early frontier America, when no motion pic-

19. Haskell, *Yesterday's Today Show*, N. Y. REV. OF BOOKS, October 12, 1978, p. 55.

20. The most recent state to use television trials in a systematic way is the new Islamic government of Iran which broadcast them and aired "full confessions" nightly on television. "2 Convicted of Torture Face Iran Firing Squad," N. Y. TIMES, June 25, 1979, p. A4.

21. *Estes v. Texas*, 381 U.S. 532, 570-71 (Warren, C.J., concurring) (1965).

tures, no television, and no radio provided entertainment, trial day in the country was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America... All too easily lawyers and judges became part-time actors at the bar....<sup>22</sup>

When functions of public entertainment and civic responsibility shifted to the press, new problems emerged. Crime and court reporting were the big guns in the circulation wars of the 19th century. They were also weapons of the press on the way to establishing itself as the organ of business community rather than of local governments and parties

22. *Id.*

## Do the media defend the rights of others?

With the prospect of TV rather than the courts calling the shots, it may be instructive to consider the record of the press in using its rights to defend the rights of others—especially those with no money, clout, or popular appeal.

A study of metropolitan newspapers' coverage of First Amendment cases before the Supreme Court shows considerably greater concern with press rights than with the other basic freedoms. The study suggests that press advocacy of freedom is largely self-serving and could not be expected to help uphold rights inimical or irrelevant to its own.<sup>1</sup>

The press also has a poor record of using information made available by the courts. Of the 139 most significant decisions announced by the California Supreme Court in 1972, a sample of 10 state daily newspapers showed that they published reports on only one-fifth of the cases. Only conflict on the court helped draw press attention to a case.<sup>2</sup> The first time the media ever paid sustained and compelling attention to the U.S. Supreme Court, even going to the extent of serializing the story, was the appearance of the personalized account of a thousand leaks, *The Brethren* by Bob Wood-

upon whose patronage it had once depended.

In that process the press shook up some bloated and venal local administrations, police and court systems. But it also assumed the responsibility for conducting trials by newspaper for what James Gordon Bennett of the New York *Herald* called the "living Jury of the Nation," ignoring the essential contrast between jury box and arena.

Things became so bad that the American Bar Association appointed a special committee in 1924 to curb "unwholesome tendencies" in news reporting. In 1927, the committee reported that "There can be no more opportune time than the present for the press to cease making vulgar amusement of our law en-

ward and Scott Armstrong.<sup>3</sup>

In the most sensitive area of citizens' rights, the area of crime reporting, the media work closely with the police and generally follow what one survey of research calls "the police version of crime."<sup>4</sup> Most studies agree that crime news generally gives a misleading and prejudicial account of the frequency and nature of crime in a community<sup>5</sup> and that such coverage provides the media "with a vehicle for communication to readers of the necessity for strong social controls."<sup>6</sup>

Broadcast coverage is, if anything, the most slanted toward the police view of due process, especially since the minicam gave crews the ability to follow police tips to the field and to concentrate on the violent and the spectacular. A 14-week survey of community coverage found the programming "often arbitrary, superficial, or both," a casualty of "the so-called 'realities' of the TV industry...."<sup>7</sup>

—George Gerbner

4. Sherizen, *Social Creation of Crime News: All the News Fitted to Print*, in Wincik, ed., *DEVIANCE AND MASS MEDIA* 222. Beverly Hills, California: Sage, 1978.

5. See, e.g., Jones, *The Press as Metropolitan Monitor*, 40 *PUB. OPINION Q.* 239-44 (1976).

6. Lippman, *The Law of Contempt: Fair Jury Trials and Free Press in Australia*, 5 *AUSTRALIAN SCAN: JOURNAL OF HUMAN COMMUNICATION* 20 (December 1978-May 1979).

7. *Public affairs weak in New York, says New School report* (a survey by the Lab for Public Affairs Television at the New School's Center for New York City Affairs), *BROADCASTING*, February 20, 1978, p. 60.

1. Hale, *A Comparison of Coverage of Speech and Press Verdicts of Supreme Court*, 56 *JOURNALISM Q.* 43 (Spring 1979).

2. Hale, *Press Releases vs. Newspaper Coverage of California Supreme Court Decisions*, 55 *JOURNALISM Q.* 696 (Winter 1978).

3. Armstrong and Woodward, *THE BRETHERN*. New York: Simon and Schuster, 1979.

forcement institutions....” Instead, however, crime photographers entered the courtroom and disrupted proceedings and even sneaked pictures of convicted murderers dying in the electric chair.<sup>23</sup>

The 1935 trial of Bruno Richard Hauptmann, accused of kidnapping the 20-month old son of Anne and Charles Lindbergh, attracted an army of reporters and photographers.<sup>24</sup> The ABA called the Hauptmann trial “the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial.”<sup>25</sup> As a result, the ABA passed Canon 35 in its Canons of Judicial Ethics, a ban on cameras and microphones in the courtroom.<sup>26</sup>

But it took two more landmark cases to educate the public—at least for a while—about the threat that television poses to justice. One was the 1954 murder trial and conviction of Dr. Sam Sheppard; the other, the 1965 swindle trial and conviction of Billie Sol Estes.<sup>27</sup> Both convictions were eventually reversed because of massive, pervasive and prejudicial publicity.

### TV as an ‘irrelevant factor’

A “circus atmosphere” prevailing at the Estes trial is often considered the cause of the reversal of the conviction. Actually, however, other considerations, as valid today as they were then, weighed heavily in the decision of the Court.

Indeed, Mr. Justice Harlan was of the view that “a circus atmosphere” was *not* the problem in *Estes*:

Cables, klieg lights, interviews with principal participants, commentary on their performances, “commercials” at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by an acceptable standard. But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.<sup>28</sup>

23. FLOIEN, *The Camera Comes to Court*, FREEDOM OF INFORMATION CENTER REPORT No. 3960. University of Missouri (October 1978).

24. *Id.*

25. FRANÇOIS, *MASS MEDIA LAW AND REGULATION* 272 (second edition). Columbus, Ohio: Grid, Inc., 1978.

26. *Id.*, at 307.

27. *Id.*, at 273-4.

28. *Estes v. Texas*, 381 U.S. 532, 588 (Harlan, J., concurring) (1965).

‘It is only the  
notorious trial which  
will be broadcast,’  
Justice Clark warned  
in *Estes v. Texas*.

Mr. Justice Clark’s opinion for the Court also noted features whose relevance only increased in time.<sup>29</sup> He acknowledged that the Sixth Amendment guarantees a “public trial” to the “accused.”

It is said, however, that the freedoms granted in the First Amendment extend the right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between newspapers and television. This is a misconception of the right of the press... The television and radio reporter has the same privilege. All are entitled to the same rights as the general public.<sup>30</sup>

Television does not contribute materially to the courts objective of ascertaining the truth, Justice Clark argued. In fact, he said, the introduction of TV represents “the injection of an irrelevant factor into court proceedings....”<sup>31</sup>

It is the sensational trial that most people will actually see, Justice Clark warned.

...From the moment the trial judge announces that a case will be televised it becomes a cause celebre... The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it... And we must remember that realistically it is only the notorious trial which will be broadcast because of the necessity for paid sponsorship.<sup>32</sup>

29. *Id.*, at 538-549.

30. *Id.*

31. *Id.*

32. *Id.*



And the effect upon justice is almost inevitable.

...If a community be hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear, and true between the State and accused....'

...But we know that distractions are not caused solely by the physical presence of the cameras and its telltale red lights. It is the awareness of the fact of telecasting that is felt...throughout the trial.

...The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable....<sup>33</sup>

Justice Clark acknowledged that newspaper coverage results in some of these same problems, but he said that "the circumstances and extraneous influences...in the televised trial are far more serious."

Television would put new responsibilities on the trial judge, too. "[I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion," Justice Clark wrote.<sup>34</sup> As soon as one judge permits telecasting, other judges—especially elected ones—could hardly resist the pressures to do the same.

Finally, Justice Clark said, the defendant would suffer if television were introduced.

A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system...<sup>35</sup>

### The trend today

The drawing power of the Watergate impeachment hearings and the lure of sensational trials has lately led to mounting media pressures to open the courts to cameras. But look at what has happened so far.

• In an Ohio case, the defendant, charged with the rape and murder of a nine-year-old girl, was allowed to be hypnotized during the examination, creating high viewer interest in the trial.<sup>36</sup>

As soon as one judge permits telecasting, others can hardly resist the pressures to do the same.

• *Hustler* magazine owner Larry Flynt was shot during a recess of the televised trial in which he was charged with distributing obscene material.<sup>37</sup>

• The murder-robbery trial of 17-year-old Ronny Zamora, televised during a one-year "experiment" in the state of Florida, became a national media sensation because television was "on trial": in a novel defense, Zamora's attorney charged that TV had induced his insanity through "involuntary subliminal intoxication." Ratings reportedly exceeded those of the Johnny Carson Show.<sup>38</sup>

In an effort to limit some of the adverse effects of broadcasting, several states—including Florida, Wisconsin and now Iowa—give their judges the power to decide whether to turn off the cameras for a particular witness or a particular case. Florida, for example, allows a judge to exclude electronic media if he finds that such coverage will affect a particular person much differently than it affects other people—and differently from the ways in which print media affect him or her.<sup>39</sup> Iowa allows the judge to refuse media coverage if a

33. *Id.*

34. *Id.*

35. *Id.*

36. White, *Cameras in the Courtroom: A U.S. Survey*, 60 JOURNALISM MONOGRAPHS 30 (April 1979).

37. *Id.*, at 16.

38. *Id.*, at 26.

39. Hoyt, *Prohibiting courtroom photography: it's up to the judge in Florida and Wisconsin*, 63 JUDICATURE 290 (December-January 1980).

witness can show "good cause."<sup>40</sup> But how can a witness or defendant possibly know, let alone show, such a thing?

Already the Florida District Court of Appeals has overturned a conviction because the judge allowed the trial to be covered despite an objection and without "a full evidentiary hearing on the possible effects of coverage."<sup>41</sup> In another Miami case, a defendant has appealed a \$1.6 million judgment on grounds that the jury returned a "newsworthy verdict in hope and expectation that they would receive further television coverage."<sup>42</sup> And now a case from the Florida "experiment" is headed for the U.S. Supreme Court, which will soon decide whether the presence of television denied the defendants a fair and impartial trial.<sup>43</sup>

### The current offensive

Camera crews are not journalists; they are union technicians hauling and handling costly equipment whose every move and minute must be carefully budgeted. Soon after the Florida "experiment" was declared a success, television prepared for the big push. ABC's Steve Tello, who had run the broadcast pool for the groundbreaking *Zamora* affair, was assigned to the biggest show yet in the line of legal spectaculars, the multiple college-girl sex murder trial of Theodore Bundy.

With its lurid and intimate details and type casting fitting the dramatic media pattern, Bundy became the first nationally televised, courtroom-originated, real-life horror show of the new era. It cost ABC an estimated \$2 million to field the crew and carry the event, a good investment by program cost and ratings standards. The judge, Edward Cowart, pronouncing his third death sentence, called the coverage "the most accurate reporting of a trial."<sup>44</sup> Bundy denounced the coverage and claimed that he had been victimized by media

"sharks." *Broadcasting* magazine declared "Verdict Is In Favor Of TV In Bundy Trial."<sup>45</sup>

Emboldened by their success and impatient with legal inhibitions, the media have launched a new offensive. An example was the careful staging of a demonstration of "cameras in the courtroom" at the August 1979 Dallas meeting of the American Bar Association. Invited by the ABA, featuring a debate and a mock TV trial, the demonstration was designed to show, in the words of National Association of Broadcasters President Vincent T. Wasilevsky, "how effectively the electronic media can operate without any interference with the dignity and decorum of the proceedings."<sup>46</sup>

Steve Tello of *Zamora* and *Bundy* fame was again pressed into service. Learning a lesson from Atlanta, camera crews donned pin stripes and were reported "almost indistinguishable from conservatively dressed ABA members."<sup>47</sup> Cables were tucked down air conditioning ducts. The formal briefs used in the mock appellate proceedings were included in a booklet entitled "Cameras in the Courthouse: A Presidential Showcase Program" and distributed at the convention. In an article headlined "TV in its Sunday Best for ABA demonstration," *Broadcasting* concluded: "No muss, no fuss: It was an example of what television technology and professionalism can do in 1979."<sup>48</sup>

The next show was the February 1980 conference of Chief Justices in Chicago. This time, Steve Tello starred in front of, as well as behind, the cameras, showing assembled chief justices the silent working of the Bundy trial cameras. Judge Cowart himself explained the need for letting the television industry participate in the courtroom rule-making process. Tello then turned on the videotape recorder and played the tape of the meeting just ending "emphatically making the point that the presence of the TV cameras—although announced at the start—had had no appreciable effect on the meeting."<sup>49</sup>

And so the bandwagon rolls on its road of non-sequiturs, misplaced demonstrations, self-serving tests and generally flawed "experi-

40. Supreme Court of Iowa, Order No. 63674, "In the Matter of Media Coverage of the Courts" (November 21, 1979), which revises Canon 3A (7) of the Iowa Code of Judicial Conduct, effective January 1, 1980.

41. FREEDOM OF INFORMATION DIG. 1, University of Missouri (September-October 1979).

42. BROADCASTING, October 17, 1977, p. 25.

43. *Chandler v. State*, 366 So.2d 64 (Florida District Court of Appeals 1978), appeal dismissed and cert. denied, 376 So.2d 1157 (Florida 1979), stay of mandate granted, (January 11, 1980) (Powell, J., in chambers).

44. VARIETY, October 31, 1979, p. 33.

45. BROADCASTING, August 6, 1979, p. 29.

46. BROADCASTING, July 30, 1979, p. 69.

47. BROADCASTING, August 20, 1979, p. 36.

48. *Id.*

49. VARIETY 1 (February 6, 1980).

ments" that permit no controls, disproof, or evaluation.

### At the point of no return

Television presents a coherent world of images and messages serving its own institutional interests. The question is whether the judiciary should be enlisted to add further credibility to media mythology. Plugging courtrooms into the television system can make them appendages of that system. Once televised trials attract a large national following, the process will be irresistible, cumulative, and probably irreversible.

The scenario unfolding now is what Chief Justice Warren warned against when, agreeing with the majority in *Estes v. Texas* that "the televising of criminal trials is inherently a denial of due process," expressed the additional view that the case at hand was only "a vivid illustration of the inherent prejudice of televised criminal trials."<sup>50</sup> Therefore, Warren wished to "make a definitive appraisal of television in the courtroom."<sup>51</sup>

In doing so, he predicted with uncanny foresight the entertainment pressures upon the selection and treatment of trials; the impact of notoriety upon participants, including jurors returning to their communities; the problem of impartially re-trying a case after wide national exposure; and the likelihood that defendants who have attracted public interest and find their "trial turned into a vehicle for television ... are the very persons who encounter the greatest difficulty in securing an impartial trial even without the presence of television."<sup>52</sup>

In his conclusion, Chief Justice Warren repeated the important point that the purposes of the media and the courts are very different.

[t]he television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom... Where the lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the general public, namely to be present, to observe the proceedings, and thereafter, if they choose, to report them.<sup>53</sup>

Without a doubt television has enriched the horizons of many who have been out of the cultural mainstream since the coming of print-oriented culture. It sometimes offers superb insight and enlightenment. Indeed, it has even provided dramatic reenactments of great moments in judicial history, going behind the scenes to illuminate the invisible but all-important principles of justice in a calmer historical perspective. But telecasting of live trials—television at its spontaneous best—would not encourage that kind of dispassionate analysis.

The political opportunities inherent in the shifting balance of powers will become more and more compelling. About 10 per cent of the electorate can now identify any judicial candidate during an election. A television trial can easily multiply that recognition factor for a candidate. (Will others ask for equal television trial time?) As a system of mutual accommodations and pay-offs develops, controls and inhibitions are likely to fall by the wayside.

Neither history nor existing research support the contention that television coverage of courts would enhance fairness, protect freedom, increase public understanding, or promote needed court reform. Only an immediate moratorium on televising trials can give us the time and the opportunity we need for responsible action.

In the face of demonstrated conflicts and incalculable risks, the burden of proof must shift from the potential victims to the proponents of trials by television. An independent scientific investigation is what we need now, both to analyze a representative sample of televised trials and segments of trials and to assess conceptions of the judicial process that television trials cultivate in the minds of the viewers, as well as the minds of participants. Until we undertake such research and until it disproves reasonable expectations about TV's effects, we should prevent television from remaking our system of justice in its own image. □

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50. *Estes v. Texas*, 381 U.S. 532 (1965) (Warren, C.J., concurring).

51. *Id.*

52. *Id.*, at 576-77.

53. *Id.*, at 585-86.